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Law between Past and Present

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Three types of 'legal history'

> *Most teachers of legal history will be familiar with the situation: you are talking to some people at a social function. At some point, an enquiry is made about your professional occupation. With some hesitation you explain that you work at a law school. With luck, people might leave it at that. But if you happen to be talking to somebody knowledgeable about law or academia, you will be prised for more information you really do not feel like spoiling a enjoyable evening with. 'Does that mean you actually teach and that you are a professor?', or worse, 'What kind of law do you teach?' It is neither the mild astonishment nor the possible interest of an amateur historian that shies you away from answering the latter question, but the almost certainty of what the next question will be: 'So what does that make you, a lawyer or a historian?' The problem with that question, for me at least, is that I have been asked it so many times that I no longer dare to reply 'My salary tells me I am a historian'. And that it is a question far too complicated to address then and there.*

The question whether legal historians should be labelled lawyers rather than historians, or the other way around, is at the heart of what legal history is, of how the past and the

law tie in. In his introduction to the proceedings of the conference on 'Time, History, and International Law' held at London in 2005, one of its conveners of that conference, Matthew Craven, distinguished three forms of 'history of international law': history in international law, international law in history and history of international law. This typology can easily be applied to legal history at large.[1]

First, there is the study of 'history in law'. Lawyers, in whatever capacity, often need to refer to the past in order to argue the existence or the interpretation of a certain rule. Whether the formal source of the rule is customary, legislative, judicial or jurisprudential, the rule roots in a more or less remote past. A rule's history is an inherent and constitutive part of the rule.

Lawyers who engage with the history of a certain legal rule as part of its constitution may do so with less or more commitment to a correct historical understanding of that history. But their primary concern is not with history itself, but with that which they hope to gain from it: an authoritative argument for their position on the existence and interpretation of the rule. Their approach to history may thus be called instrumental. The past is relevant to them because it carries authority and legitimises present-day law. This in turn makes the past a primary victim of the authority that speaks the law, and reads the past which it needs into it, often distorting

[1] Matthew Craven, 'Introduction: International Law and Its Histories', in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi, eds., *Time, History and International Law,* Leyden/Boston 2007, 1-25. For alternative but related typologies: Dirk Heirbaut, 'Reading Past Legal Texts. A Tale of Two Legal Histories. Some Personal Reflections on the Methodology of Legal History', in D. Michalsen, ed., *Reading Past Legal Texts*, Oslo 2006, 91-112; Herman van den Brink, 'Typen van rechtshistorie', in J. Van Herwaarden, ed., *Lof der historie. Opstellen over geschiedenis en maatschappij*, Rotterdam 1973, 31-46.

it. The concern is not with understanding the past as it truly was, but with presenting a construction of it that serves today's purposes. William Wiecek's saying that '[t]he United States Supreme Court is the only institution in human experience that has the power to *declare* history' comes to mind, although the same claim can be made for many other institutions with the power of laying down, interpreting or declaring the law.[2]

This concern with the authority of the past easily leads to what is in essence an a-historical approach to the past. Authority does not come from the remoteness of the origins of a rule, but from the aura of timelessness, of immutability its distant origins are associated with. The lawyer who looks for an authoritative argument in the past will not so much concern himself with the dynamic evolution of a rule from past to present, but will want to prove the timeless nature of the rule by indicating its stability through different times and under different circumstances. To this end, it is completely unnecessary, if not harmful to try and understand the rule within its own historical context. To the contrary, it needs to be abstracted from the context it stood in during the phases of its evolution and be studied as an autonomous category.

Professional legal historians themselves have often given in to the lure of this kind of 'history in law'. In fact, both in the civil and common law worlds,[3] there is a

[2] William M. Wiecek, 'Clio as Hostage: The United States Supreme Court and the Uses of History', *California Western Law Review,* 24 (1987-1988) 227-76, at 227. See also David Sugerman, 'Legal History, Common Law, and Englishness', in Kjell A. Modeer, ed., *Rättshistoria I förändring. Olinska stiftelsen 50 år*, Lund 2002, 213-25.

[3] On the common law, Robert Gordon, 'Historicism in Legal Sholarship', *Yale Law Journal,* 90 (1981) 1017-56; idem, 'The Historical Argument in American Legal Culture', in Kjell A. Modeer, *Rättshistoria I förändring. Olinska stiftelsen 50 år*, Lund 2002, 181-201; David Ibbetson, 'What is Legal History a

strong tradition of a-historical 'legal history'. In the civil law world, this is most markedly so in the study of Roman law. For eight centuries, since its rediscovery in the late 11th century and until well into the 19th century, the Justinian collection and particularly the Digest have formed the focus of the study of secular law at the universities of Europe. For most of that time, it was not studied as a source of information about a historical legal system, but as an authoritative text which embodied an internally consistent and logical system of law, reflecting divine or human rationality. The German Pandect Science of the 19th century represents the high water mark of this dogmatic approach to Roman law in modern times.[4] For much of medieval and modern history, the study of Roman law was not a study of history, but of jurisprudence. Its purpose was not to understand Roman law within its historical setting, but to abstract it from its context in order to descry the timeless principles and rules that formed the frame of the ideal system of law it embodied. This civilian jurisprudence only merits the epithet 'historical', which it is often given, from the perspective of the present, because it is a historical phenomenon itself.[5]

Until the codification of civil law, which in Germany only came about at the turn of the 20th century with the introduction of the *Bürgerliches Gesetzbuch*, the learned Roman law remained not only the hardcore of university teaching in law, but also retained a position of authority in legal practice. With the codification, Roman law

History of?', in Andrew Lewis and Michael Lobban, eds., *Law and History* (Current Legal Issues 6) Oxford 2003, 33-40.

[4] Randall Lesaffer, *European Legal History: A Political and Cultural Perspective*, Cambridge 2009; Peter Stein, *Roman Law in European History*, Cambridge 1997.

[5] On this 'historical jurisprudence' and a critique of it, Herman van den Brink, 'The Crisis of Roman Law', in idem, *The Charm of Legal History*, Amsterdam 1974, 7-21.

lost its authority as a formal source of law, although its influence can easily be retraced in many civil codes and their subsequent professorial and judicial interpretations.[6] It also lost its hold over university teaching. Over a few generations, the study of Roman private law degraded from the backbone of the whole curriculum to an introduction to private law taught at the start. During the final quarter of the 20th century, in many European countries, Roman law as a separate subject disappeared altogether and was, at best, integrated in a general course on European legal history.

Roman law's loss in the halls of Themis was its gain in the halls of Clio. The demise of its hold over contemporary law liberated the study of Roman law from the stranglehold of its traditional dogmatic approach and offered leeway to study Roman law for what it truly was: the law of an ancient, much revered, but past civilisation. During the 20th century, many 'Roman lawyers' devolved into true historians of ancient Roman law, trying to reconstruct and understand Roman law as the Romans understood it at the several stages of its evolution. In this historical approach, the Digest and the other parts of the Justinian collection are no longer perceived as embodying a legal system, but as the rather loose and very unsystematic collection of thousands of legal excerpts stemming for different ages. This historical approach too stands in an old tradition, that of the humanist jurisprudence of the 16th and early 17th centuries. Under the influence of humanism, some jurists of the 16th century voiced sharp criticism of the traditional approach to Roman law by the late medieval commentators. Whereas the commentators considered the Justinian collection the authoritative source of a timeless, rational and perfect law – *ratio scripta* if not *lex scripta* – the humanists took it for what

[6] Raoul van Caenegem, *European Law in the Past and the Future: Unity and Diversity over Two Millennia,* Cambridge 2002; Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*, Oxford 2001.

it was: the legal heirloom of a much revered, but defunct civilisation. Ancient Roman law deserved to be studied because it represented, like the whole classical civilisation, the high point of human accomplishment. The ultimate purpose was to emulate it. But in order to do so, it first has to be understood as the Romans had devised it.[7]

Nevertheless, until this day, Roman law has not shed the influence of the dogmatic approach completely. In many universities, it is still taught as a kind of preparatory introduction to the system of private law, even if under the name of a general class in European legal history. Moreover, many of the assumptions about the systematic character of classical and post-classical Roman law as reflected in the Digest continue to underlie the discourse of its historiography. Many Roman lawyers still underscore the systematic character of classical Roman jurisprudence and underplay its casuistic character.[8]

Second, there is 'law in history'. This refers to the study of law within its broad social, economic, cultural and political context. The object of study is the mutual interaction between law and society at a certain time and certain place in history. The central question here is just what the law was and how it functioned in society at a given

[7] Donald R. Kelley, *Foundations of Modern Historical Scholarship: Language, Law and History in the French Renaissance*, New York 1970; idem, 'Civil Science in the Renaissance: Jurisprudence in the French Manner', *Journal of the History of Ideas* 3 (1981) 261-276; I. Maclean, *Interpretation and the Meaning in the Renaissance. The Case of Law*, Cambridge 1992; Peter Stein, 'Legal Humanism and Legal Science', *Legal History Review*, 54 (1986) 297-306.

[8] Jan Willem Tellegen, 'Savigny's System and Cicero's Pro Caecina', *Orbis Iuris Romani*, 2 (1996) 86-112; Idem and Olga Tellegen-Couperus, 'Law and Rhetoric in the causa Curiana', *Orbis Iuris Romani*, 6 (2000) 171-202; Kaius Tuori, *Ancient Roman Lawyers and Modern Legal Ideals: Studies on the impact of contemporary concerns on the interpretation of ancient Roman legal history*, Frankfurt 2007; Van den Brink, 'The Crisis of Roman Law'.

time and place. The historian is not primarily concerned with the origins or further evolution of that law. The historical law of that given time and place is studied as a phenomenon within the particular society the historian is interested in and not as a phase within the evolution of the law. This kind of historical research into the law is more often conducted by historians working in history departments rather than law schools and is, in terms of methodology, the most 'historical' of all three. What this entails will be explained in the final pages of this chapter.

Third, there is 'history of law'. This type of legal historical literature holds a middle position in the continuum between the former two. It is first and foremost the preserve of legal historians who hold law degrees and are attached to law schools or legal research institutes. This denominator extends to research which considers law a self-contained historical phenomenon. The purpose of this type of legal history is to understand what the 'law' was at a certain time and place in history. It only differs from the study of contemporary law in that it concerns law from the past. The object of study may be either the law system as a whole, or just a particular branch, institution, principle, rule or concept. While the study of the law as a whole is often referred to as external legal history and that of particular parts of it as internal legal history, it would be more correct to speak of macro- and micro-legal history. The term external legal history could better be applied to 'law in history' and the term internal legal history to 'history of law'.[9]

Much of 'history of law' is also evolutionary. It is not the law as it was at a certain time that truly interests legal historians, but its gradual evolution from past to present. This historiography of the law aims at explaining historically why the law

[9] Cfr. Ibbetson, 'What is Legal History', 33-4. Van den Brink spoke of 'historical sociology of law' and 'history of law', 'The Crisis of Roman Law', 20.

today stands as it does. This kind of legal history is practised on both the micro- and the macro-level. On the micro-level, it is often applied to the historical evolution of a certain legal doctrine – *Dogmengeschichte* ('dogmatic history'). At the macro-level, the focus is often on jurisprudence – particularly as far as the civil law tradition is concerned. At any level, evolutionary history often reads as a tale about the progressive growth and ascendancy of today's law, a kind of 'Whig interpretation' of legal history.[10] This optimistic approach to legal history is particularly dominant in certain branches of the law, such as international law.[11]

The Westphalian myth: an example

The historiography of international law is a good example of how these three approaches to law and history work out. Few issues among students of international law and its history illustrate the differences between the three approaches to law and history as appositely as the debate on the significance of the Peace of Westphalia of 1648. Among international lawyers and legal historians, but also and even more so among students of international relations and its theory, 'Westphalian' has since long

[10] The 'Whig interpretation of history' is the traditional interpretation of the rise of Britain as a great power from the late 17th century onwards as seen from the liberal and protestant perspective. It is the straightforward success-story of the British parliamentary monarchy, the protestant succession and British maritime and commercial ascendancy. Herbert Butterfield, *The Whig Interpretation of History*, New York/London 1965.

[11] Randall Lesaffer, 'International Law and its History: The story of an unrequited love', in Craven et al., eds., *Time, History and International Law*, 27-41.

become a buzzword for the international system of sovereign States that arose in Europe between the 17th and 19th centuries and conquered the world in the slipstream of European colonialism and imperialism in the 19th and 20th centuries. In as far as the legal aspects of the peace treaties of 1648 are concerned, much of this is the fruit of a 'history in law' and/or 'history of law' approach to Westphalia.

A prime example of this is offered by an article that was published in 1948, on the 300th anniversary of 'Westphalia', in the prestigious *American Journal of International Law*. Its author, Leo Gross, opens by stating that

> The acceptance of the United Nations Charter by the overwhelming majority of the members of the family of nations brings to mind the first great or world charter, the Peace of Westphalia. To it is traditionally attributed the importance and dignity of being the first of several attempts to establish something resembling world unity on the basis of states exercising sovereignty over certain territories and subordinated to no earthly authority.[12]

The author then goes on to refer to two other great peace settlements, that of Vienna of 1815 and that of Versailles of 1919, both of which ultimately failed. According to Gross, a similar fate threatens the Charter as it too left 'essentially unchanged the framework of the state system and of international law resulting from the Peace of Westphalia'.[13]

[12] Leo Gross, 'The Peace of Westphalia, 1648-1948', *American Journal of International Law*, 42 (1948) 20-41, at 20.

[13] Gross, 'Westphalia', 21.

Gross subscribes to what can be called the traditional interpretation of the history of modern international law that is common among international lawyers, itself an important example of an evolutionary 'history of law'. Under this view, the story of modern international law begins in the 17th century with the rise of the sovereign State. As the first international act to lay down the basic principles of sovereignty, religious equality, the balance of power and as the product of a truly European peace conference, the Peace of Westphalia is considered to constitute the final break with the old hierarchical system of medieval Europe and the official birth-certificate of the sovereign States system. From there on, international law, or better the classical law of nations, developed into a system of rules accommodating rather than restricting the sovereignty of the European States, putting relatively few breaks on their liberty to wage war and pursue their interests. The heyday of the sovereign State and of the 'Westphalian system' was the 19th century. Only with the 20th century, with the League of Nations and then with the United Nations, came the first serious and partly successful attempts to restrict the free arbiter of States. It is in the context of the ongoing debate between State sovereignty and international community that 'Westphalia' and the 'Westphalian system' hold their place as point of origin and term of reference to the sovereign States system.[14]

Leo Gross considers Westphalia the birth act of the sovereign States system, the U.N. Charter fails to do away with. Gross presses the point that Westphalia is an antecedent to the U.N. Charter. He underscores all elements of resemblance, searching for elements of continuity and immutability. He looks for and finds the essential

[14] On this traditional interpretation, see Randall Lesaffer, 'The Grotian Tradition Rivisited: Change and Continuity in the History of International Law', *British Yearbook of International Law*, 73 (2002) 103-39.

elements that constitute the sovereign States system in Westphalia. In the sovereign States system, independent States organise international relations on the basis of great, multilateral treaties that serve as constitutive acts. Westphalia is considered to be such a treaty. Gross even refers to it as a 'world charter'. The basic, constitutive principle is sovereignty, which is said to have been established by and at Westphalia. Religious equality among the nations, as a point of non-intervention with internal affairs, is an essential condition of sovereignty, and indeed, it was already inscribed in the Westphalia Peace Treaties. Finally, a strict equality prevents any State or ruler from holding higher authority. The balance of power is designed to protect that and it too is said to have been introduced as a general principle of the international system at Westphalia.

Because the era from the 17th to the early 20th century is understood in terms of the rise of the sovereign States system and Westphalia is seen as its point of origins (history of law), Westphalia needs to be considered the point in time where all of the system's main features were introduced and articulated (history in law). Because sovereignty, religious equality and the balance of power are central to the debate on the current evolution of international law and the international system in the 20th century, they need a firm locus in history. A historical foothold for these concepts is much needed, because they have come under debate in the 20th century and now appear in a dynamic tension with opposite tendencies under the League of Nations or the United Nations. Scholars are therefore in need of a point of reference in which the 'old' conceptions appear in a more pure form as self-standing historical phenomena from which they can now move away, or not. In other words, they need a point in history where these concepts appeared in their 'original' form. 'Westphalia' serves this purpose. In Gross's words:

> Thus the Peace of Westphalia may be said to continue its sway over political man's mind as the *ratio scripta* that it was held to be of yore.[15]

With *ratio scripta,* Gross uses the term which commonly refers to the position of Roman law as the embodiment of timeless natural justice.

In sum, in this reading of Westphalia, a 'history in law' approach tangles in with an evolutionary 'history of law' approach; they mutually determine one another. Gross's main concern is not historical. The purpose of his article is to show that the U.N. Charter has an important antecedent in Westphalia and is in fact 'Westphalian' to the extent that it does not sufficiently transcend the sovereign States system. To sustain this, he needs to trace all the essential and immutable characteristics of the Charter system back to Westphalia, which clearly constitutes a 'history in law' approach of the subject. To sustain the claim that Westphalia is at the roots of the sovereign States systems the U.N. Charter fails to dispose of, he needs to construct an evolutionary 'history of law' from Westphalia to the Charter in terms of the gradual articulation of a sovereign States system that did not change or shed its essential 'Westphalian' features.

At a more detailed level, Gross's treatment of the principle of religious equality illustrates this a-historical interplay between 'history in law' and 'history of law' quite well. First, there is a 'history in law' dimension to his interpretation of Westphalia. According to him, 'Westphalia consecrated the principle of toleration by establishing the equality between Protestant and Catholic states and providing some safeguards for religious minorities'.[16] This can only be read as the introduction of a principle in the

[15] Gross, 'Westphalia', 21.

[16] Gross, 'Westphalia', 22.

international system that is central to the modern, late 19th- and 20th-century understanding of it. But in fact, Westphalia did nothing of the sort.

The Peace of Westphalia, actually a common denominator referring to the two Peace Treaties of 24 October 1648, one signed at Munster and the other at Osnabruck, did not introduce religious equality among States in international law. But this can only be gleaned from a 'law in history' approach to the treaties.[17] *Primo*, the relevant paragraphs of the peace treaties only pertained to the estates, the *Reichsstände*, the composite members of the Holy Roman Empire. These were not sovereign States. The

[17] Over recent years, numerous historical re-interpretations of Westphalia have been put forward, such as: Stéphane Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?', *Journal of the History of International Law*, 2 (2000) 148-77; Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty', *International History Review*, 21 (1999) 569-91; Arthur Eyffinger, 'Europe in the Balance: An Appraisal of the Westphalian System', *Netherlands International Law Review*, 45 (1998) 161-87; Peter Haggenmacher, 'La paix dans le pensée de Grotius', in: Lucien Bély (ed.), *L'Europe des traités de Westphalie. Esprit de diplomatie et diplomatie de l'esprit*, Paris 2000, esp. 68-69; Randall Lesaffer, 'The Westphalian Peace Treaties and the Development of the Tradition of Great European Peace Settlements prior to 1648', *Grotiana*, new series 18 (1997) 71-95; Andreas Osiander, 'Sovereignty, International Relations and the Westphalian Myth', *International Organization*, 55 (2001) 251-87; Meinhard Schröder, 'Der Westfälische Friede – eine Epochengrenze in der Völkerrechtsentwicklung?', in: Schröder (ed.), *350 Jahre Westfälischer Friede. Verfassungsgeschichte, Staatskirchenrecht,Völkerrechtsgeschichte*, Schriften zur europäischen Rechts- und Verfassungsgeschichte vol. 30, Berlin 1999, 119-37; Heinhard Steiger, 'Der Westfälischen Frieden – Grundgesetz für Europa?', in: Heinz Duchhardt (ed.), *Der Westfälische Friede. Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptionsgeschichte*, Munich 1998, 33-80; Benno Teschke, *The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations*, London/New York 2003; Karl-Heinz Ziegler, 'Die Bedeutung des Westfälischen Friedens von 1648 für das europäische Völkerrecht', *Archiv des Völkerrechts*, 37 (1999) 129-51; idem, 'Der Westfälischen Frieden von 1648 in der Geschichte des Völkerrechts', in: Schröder, *350 Jahre Westfälischer Friede*, 99-117.

relevant provisions were not part of the law of nations, but of the internal law of the Empire. *Secundo,* Westphalia restricted rather than expanded the freedom of the German princes and rulers to choose religion. In 1555, the Peace of Augsburg had stipulated the principle of *cuius regio, eius religio,* meaning that the ruler of a certain territory could impose his religion – Catholic or Lutheran, or after Westphalia also Calvinist – upon his subjects. If the ruler converted and demanded the same of his subjects, the latter were left with the choice to convert as well or to emigrate. The Peace of Westphalia amended this rule only to the extent that it froze the situation of before the 'normal year' 1624, taking away from the ruler the right to demand his subjects to convert if he chose to do so.[18] *Tertio*, the Peace of Westphalia guaranteed to Catholics and Protestants an equal number of judges from their respective denominations on the bench if a case brought before the Imperial Chamber Court, the supreme court of the Empire involved litigants from different confessions.[19] *Quarto*, it prevented the religious majority from using its numbers in the Imperial Diet, the highest political organ of the Empire.

The 'legal' and 'historical' interpretations of this Peace of Westphalia thus greatly differ. Whereas the legal interpretation – such as Gross's, notwithstanding the qualifications he made – leads to interpreting the Peace as laying down the principle of the religious neutrality of international law, the Peace did in fact little more than nuance the principle of the religious unity within each of the Empire's estates by taking away the ruler's right to change religion and enforce his conversion upon his subjects. The purpose behind all this was not tolerance, but internal peace. In any case, the makers of

[18] Peace Treaty of Osnabruck (IPO), Arts. 5.1-2, 31-2, 34-7, 42-4.

[19] IPO, Art. 5.54.

the Peace did in no way aspire to introduce any principle regarding law and religion at the level of the 'international community' or international law.

Second, there is a 'history of law' dimension in Gross's treatment of religion in Westphalia. The search in the past for the original appearance of a current legal conception or rule cannot be separated from an evolutionary approach to legal history that underscores continuity and a gradual, straightforward evolution of that conception or rule. In order to make such an interpretation feasible and credible, the 'historian of law' will have to abstract the conception or rule throughout the different phases of its evolution as much as possible from its context, and regard it as an autonomous category. In the process, the historian will focus on the essential features of the legal conception or rule which are considered immutable and indicate those – not-essential – changes to it that explain its shift from what it originally was to what it has evolved into.

After having, mistakenly, stated that the Westphalia Peace introduced the principle of toleration in the international system, Gross sketches a straightforward evolution of the principle being expanded and becoming an ever more established part of international law and the international system. From Westphalia, he jumps a century and a half ahead to the Congress of Vienna (1815). In the Constitution of the new Germanic Confederation – the successor to the Holy Roman Empire – which forms part of the Congress's Final Act and thus of international law, religious equality is guaranteed. From there, he moves to the Berlin Conference (1878) where religious freedom was proposed as a basic principle of the international community. Moving past Versailles, he then makes a reference to the Preamble to the U.N. Charter re reaffirming 'faith in fundamental human rights' and the duty 'to practice tolerance and live together in peace with one another as good neighbours'. Although all the documents Gross invokes are real and hard historical facts and he does not add any interpretation of his

own in quoting them, the mere act of placing them in a continuous line sets Westphalia at the beginning of an evolution from religious tolerance in international relations to the international protection of human rights after World War II and suggests that much of what came later grew in some way or another from its Westphalian roots. Each episode thus gains the significance of being a preparatory step towards the next one.[20] It is clear, even to the non-specialist of the subject, that Gross's claims to the 'historical' significance of Westphalia in this evolution are much overstated. Although the Westphalia Peace did contribute, if modestly and indirectly, to the emergence of religious tolerance as a principle under international law, the actual evolution was far less straightforward. In fact, it would be well over a century before religious tolerance would become a major concern in international relations and international law. But aside from this, and more importantly, none of the authors of these events which Gross arranged as stepping stones towards more tolerance were driven by a concern to contribute to the international recognition of 'fundamental human rights', but rather by a far different, political agenda relevant to their own times and purposes.

For a proper understanding of the past, and its impact on further developments, it is necessary to try and understand each episode on its own. It is only through understanding the political agenda which drove the negotiators of 1648 that we can truly assess the impact of the change as it occurred then. Only when we understand the limited extent of 'tolerance' in the Westphalia Peace, in terms both of content and of territorial application, can we appreciate the length of the road to be covered between Westphalia and any later episode mentioned by Gross. In this way, the enormous differences rather than similarities between Westphalia, Vienna, Berlin, Versailles and

[20] Gross, 'Westphalia', 22-4.

the Charter are highlighted, setting the legal historian on the right path to answering the question when, why and how these differences were gradually bridged. In other words, true 'history of law' is impossible without engaging into 'law in history' first and evade the snare of a 'history in law' conception of the past.

The legal historian as historian

Let us now return to the initial question whether the legal historian should be considered a lawyer rather than a historian or vice versa. As it appears from the example above, the three approaches to the interaction between law and history do not all truly deserve the label 'history'. In fact, they span a broad continuum that gradually shifts from a true historical study of past law in its contemporary context ('law in history') over the historical study of law as a self-contained phenomenon ('history of law') to what is in fact historical jurisprudence or even the instrumental use of historical argument in jurisprudence or legal practice. While it is difficult to draw a line that sharply divides law from history and the lawyer from the historian, it can be argued that in order to speak of legal *history*, we should at least respect some of the rudiments of historical methodology. The instrumental use of history in law, much of what is called historical jurisprudence – but not the historical study of historical jurisprudence itself – and even some forms of evolutional history of law, while having value on their own, are not to be considered 'legal history' in the sense of being historical – they are not.

Even among legal historians, this position is not be taken for granted. In many countries, including the Netherlands, legal historians have engaged in fierce debates on what legal history should constitute. The debate is overshadowed and distorted by the

question to what extent the historical study of the law should be of relevance to the understanding or improvement of the law today and how this should be accomplished.

As most professional legal historians in the recent past and today work and teach at law schools, this is an understandable, albeit not necessarily legitimate question. Law school deans and managers of all kinds prefer, if they are at all willing to invest in a field as legal history, its contribution to the formation of lawyers and to the study of contemporary law to be as obvious and direct as possible. In a time when quality is measured in numbers and numbers are easiest to count when they are to be found in balance sheets, this is only to be expected. It is undoubtedly for this reason that many legal historians prefer to be called jurists rather than historians and still cling to a dogmatic approach of a historical legal system such as Roman private law. They will often reproach proponents of the historical approach for making legal history more of an esoteric undertaking that is of little interest to the training of modern lawyers or to the study of contemporary law. It is not a novel reproach; it is one the first true historians of Roman law, the humanist jurists of the 16th and 17th centuries, already had to face.[21]

The way the debate about the use of legal history for contemporary law is waged is lopsided and unproductive. There is no sound basis to hold that a truly historical approach to law makes legal history less relevant to the understanding of current law than the more 'juridical' one. To the contrary, there are reasons to argue that the more 'juridical' and the less 'historical' legal history becomes, the less it has to offer to the study of law, if only because it becomes less distinct from it. A 'legal history' which fails to understand the past in its own terms and on its own merits will probably fail to bring anything to the discussion other than some random factual proof or some

[21] Raoul C. Van Caenegem, *An Historical Introduction to Private Law*, Cambridge 1992.

arguments of authority for a preconceived notion that roots, not in the past, but in present law. Before we can learn anything from history that might be relevant for the present, we first have to let history speak for itself. That is indeed what the humanist jurists already claimed and were to a large extent successful at. Even though the historical-philological study of Roman law undertaken by the humanists was an esoteric endeavour in itself, humanism did not stop jurists from applying Roman law to contemporary practice and even allowed them to do so with a better understanding of the historical material they sought to imitate and emulate.[22]

While the three approaches to law and history described above are legitimate in their own right, not all can claim to be historical in the sense of actually offering a discourse on the past and producing insights into the present based on a proper understanding of the past. Only the study of 'law in history' and, sometimes, of 'history of law' can do so. This does not prevent jurists who want to engage with the past as part of contemporary law from drawing on the findings of the true legal historian and bring them to bear on their discourse. In other words, scholars who want to use the past in order to understand or legitimate the present have to approach the past in two phases. First, they need to study the past in its own right and on its own terms. For this, the use of a sound historical methodology is mandatory. Second, they can use the understanding of past law to reconstruct the evolution of a certain rule, institution or doctrine, or to engage in comparative law through time.

The object of history

[22] Lesaffer, *European Legal History*, 354-5.

This is not the time or the place to take up the debate about the scientific character of historiography, nor about the details of its traditional methodology. A few brief and general remarks and guidelines will suffice here.[23]

Let us start with two general remarks. First, 20th-century historiography has been marked by growing doubt about the possibilities of objective history. As late the end of the 19th century, the belief held sway that the past – just as all other objects of human behaviour and academic study – could be made intelligible and grasped through the rigorous application of the methodology of historical study. An objective and historically correct because methodologically sound reading of the primary sources, would unravel and elucidate all historical facts in their mutual relations and interactions. By the end of the 19th century, it was widely felt that the moment of accomplishing this task was at hand. As the 1st Lord Acton (John Dalberg-Acton, 1834-1902) remarked in his report to the publisher of the first edition of the *Cambridge Modern History* in 1896:

> It is a unique opportunity of recording … the fullness of the knowledge which the nineteenth century is about to bequeath … By the judicious division of labour we should be able to do it, and to bring home to every man the last document, and the ripest conclusions of international research.

[23] For elementary literature on the history of historiography and its theoretical challenges: John Burrow, *A History of Histories: Epics, Chronicles, Romances and Inquiries from Herodotus and Thucydides to the Twentieth Century*, London 2007; E.H. Carr, *What is History*, 2nd edn., London 2001; R.G. Collingwood, *The Idea of History*, rev. edn., Oxford 1993; Richard J. Evans, *In Defense of History*, New York and London 1997; John L. Gaddis, *The Landscape of History: How Historians Map the Past*, Oxford 2002; George Iggers, *Historiography in the Twentieth Century: From Scientific Objectivity to the Postmodern Challenge*, Middleton, CT, 1997.

> Ultimate history we cannot have in this generation; but we can dispose of conventional history, and show the point we have reached on the road from the one to the other, now that all information is within reach, and every problem has become capable of solution.[24]

Halfway through the 20th century, this kind of optimism about the possibilities of objective historiography had gone down together with the demise of Western cultural optimism at large. The subjectivity of both the historian and of the author of the primary written sources on which the historian relied made a direct and thus reliable observation of the past impossible. History was increasingly seen as an attempt to reconstruct something that did not exist any more, or even to reconstruct something which only ever existed in the mind of the historian himself. Leopold van Ranke's (1795-1886) famous dictum that the historian should, could and would unearth 'wie es eigentlich gewesen ist' give way to Benedetto Croce's (1886-1952) or Marc Bloch's (1886-1944) pessimism:

> History is the historian's experience. It is made by nobody save the historian: to write history is the only way of making it.[25]

> On a dit quelquefois: 'L'histoire est la science du passé'. C'est à mon sens mal parler. Car d'abord, l'idée même que le passé, en tant que tel, puisse être l'objet de science est absurde. Des phénomènes qui n'ont d'autre caractère commun que de ne pas avoir été contemporaine, comment sans décantage préalable en ferait-on la matière d'une connaissance rationnelle?[26]

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[24] *The Cambridge Modern History: Its Origin, Authorship and Production,* Cambridge 1907, 10-12.

[25] Quoted from Arthur Marwick, 'Two Approaches to Historical Study: The Metaphysical (Including 'Postmodernism') and the Historical', *Journal of Contemporary History*, 30 (1995) 5.

[26] Marc Bloch, Le métier de l'historien', in Marc Bloch, *L'histoire, la guerre, la Résistance*, Paris 1993, 864.

As Richard Evans rightly argued, this postmodern scepticism about the possibility of history should not be taken too far. The postmodern critique of history is right in its claim that the past does not exist as such; it can only be revived through the mental reconstruction the historian makes. Inevitably, this reconstruction will be determined and dictated by the historian's preconceived notions and concerns, just as the historical sources he uses will have been determined by those of their author. But this does not imply that we must take postmodern scepticism to its extreme consequences as Jacques Derrida (1930-2004) did with his theory of intertextuality. According to Derrida, the historian can not reach beyond the texts he wrote or used. The historian can only inform us about the texts he used and not reach into the past.[27]

That, however, the historian can do.[28] His remoteness of the historian from his object, the intermediate and distorting role of the sources and the impact of present-day concerns on the historian are all undeniably true, but they do not imply that all history is equally subjective or uninformative. Imperfect witnesses though they may be, historical sources – textual and other – do inform us about past events. A sound historical methodology, based on the awareness of the challenges postmodernism has unearthed, will still allow one historian to make a more faithful representation of the past than the other.

Second, the legal historian who aspires to understand the past should not set himself apart in any way from the historian at large. Paraphrasing Karl Marx (1818-1881), in taking up his chair of legal history at Rotterdam, Herman van den Brink stated

[27] Jacques Derrida, *Of Grammatology*, Baltimore 1998.

[28] See Hans-Georg Gadamer, *Wahrheit und Methode*, Tübingen 1960; Paul Ricoeur, *La mémoire, l'histoire, l'oubli*, Paris 2000.

'es gibt kein Geschichte des Rechts'. What he wanted to indicate is that law cannot be separated from its broader context and that, by consequence, its historical study cannot isolate law from its historical context.[29] While it might be too radical to take this to the point of excluding all internal legal history from the world of history, it is certainly true that merely observing legal phenomena in the past will rarely lead to a proper understanding of them. In other words, internal legal history without the benefits of external legal history will probably end up not being very historical at all. But there is another dimension we can add to Van den Brink's provocative words. There also is no separate legal history in the sense of a methodology which is fundamentally different from that of other historical subdisciplines. The demands of sound historical research that apply to the other branches of historiography apply to legal history as well.

The craft of history

When engaging with the past, the student of law should always take the 'law in history' as his point of departure, even when the goal of the exercise is discussing 'history of law' or 'history in law'. In other words, the approach should consist of two phases. Before we can understand the historical evolution of the law or translate lessons from the law's past to the present, we should first try to understand the past in its own terms. This implies an attempt to understand the law as it was understood at the time. To do

[29] Karl Marx and Friedrich Engels, *Historisch-kritische Gesamtausgabe*, 1.5, Berlin 1932, 63: 'Nicht zu vergessen, daβ das Recht ebensowenig eine eigene Geschichte hat wie die Religion'; Van den Brink, *Ex iure Quiritium: Geschied- of rechtswetenschap?* Deventer, 1968, 3-5; and idem, 'The Crisis of Roman Law', 13-21.

this, the scholar will have to apply historical methodology. This is a complex, sophisticated and technical method which cannot be explained in a couple of pages. Some guidelines will have to suffice here.[30] What follows can be read as a 'bluffer's guide to doing history'.

First, *let the past speak in its own voice*. The linchpin of all historical research is the study of primary sources. These are textual and other sources that are contemporary to the historical period being studied. Although it is expedient to first acquaint ourselves with modern secondary literature on a historical topic, the student of history should not wait too long before turning to the sources. Reading and rereading the historical sources beats any other approach. Of course, textual sources are no direct witnesses of past events, as they themselves have been moulded by their authors. But they are far more direct witnesses of past events than secondary literature is. Moreover, they offer a direct and unmediated way of listening to the voice of past generations, in their own language and from their own perspective. And while it is inevitable that the historian will approach the sources with notions which have been shaped by his own experiences and interests, engaging too much with the views and theories from modern literature will only exacerbate the problem. It is therefore wise to initially only use secondary literature as a guideline to select the sources one should read – or not read – and then turn directly to the sources. Only then, there should follow a serious engagement with modern literature.

[30] For introductions to historical methodology: Jules R. Benjamin, *A Student's Guide to History,* Boston 1998; Marc Boone, *Historici en hun metier. Een inleiding tot de historische kritiek,* Gent 2007; John Tosh, *The Pursuit of History: Aims, Methods, and New Directions in the Study of Modern History,* 2nd edn., London 1991; Robert C. Williams, *The Historian's Toolbox. A Student's Guide to the Theory and Craft of History,* New York and London 2007.

This brings us to the second point: *history is not a social science*. Although historical argument is often used by social scientists to construct and underpin their theories, history is not a social science and does not live by theory. As John Lewis Gaddis observed, what the social sciences have in common is their aspiration to explain complex phenomena in terms of one leading theory or idea.[31] They try to reduce the myriads of historical causes to one or two all-explaining determinants. But whereas the social sciences deal in clarity, the business of history is complexity. Especially in a time when the academic study of law is increasingly shifting towards the approaches and methodology of the social sciences, the lawyer should be careful not to approach the past in a reductionist fashion. Seldom, if ever, can complex historical events be explained in terms of one guiding principle, choice or 'law' of human behaviour. The legal historian should be careful not to question the law of the past from the perspective of a recent explanatory theory, at least not before he has studied and understood the past law in its own terms. A theory of human behaviour should grow from the understanding of the past, and not the other way round. Theory should be inducted into the complex facts of history rather than these facts being deducted from theory. The differences between history and social science are nicely captured in the following anecdote Gaddis quoted:

> Some years ago I asked the great global historian William H. McNeill to explain his method of writing history to a group of social, physical and biological scientists attending a conference I'd organized. He at first resisted doing this, claiming that he had no particular method. When pressed, though, he described it as follows:

[31] Gaddis, *The Landscape of History*, 53-90.

> ‘I get curious about a problem and start reading up for it. What I read causes me to redefine the problem. Redefining the problem causes me to shift the direction of what I’m reading. That in turn further reshapes the problem, which further redirects the reading. I go back and forth like this until it feels right, then I write it up and ship it off to the publisher.’
>
> McNeill’s presentation elicited expressions of disappointment, even derision, from the economists, sociologists, and political scientists present. ‘That is not a method,’ several of them exclaimed, ‘It’s not parsimonious, it doesn’t distinguish between independent and dependent variables, it hopelessly confuses induction and deduction’. But then there came a deep voice from the back of the room. ‘Yes, it is,’ it growled, ‘That’s exactly how we do physics.’[32]

Third, *the clock always runs forwards*. In the end, much legal history will at some point become ‘history of law’ in the sense of evolutional history. In itself, that is not a problem as long as we adhere to two simple guidelines. *Primo*, we should construct the line of evolution from a sound understanding of each phase on its own. *Secundo*, we should construct the line of evolution from past to present, and not the other way round. This may sound self-evident and trite, but it is not. Much evolutional legal history is written from the perspective of the present. The scholar departs from contemporary law and questions its historical antecedents, moving from change to change and each time going further back into the past. In this way history deforms into a kind of genealogy. This approach has several major drawbacks. To begin with, it is reductionist as it narrows the perspective to only those historical phenomena that have borne fruit in the present. It is a history of success stories to the exclusion of those human decisions and actions that have no direct, obvious bearing on the present. Furthermore, it leads to an anachronistic understanding of the past. Looking for historical antecedents of things we

[32] Gaddis, *The Landscape of History*, 48-9.

are familiar with today is probably the worst approach to slip into the minds of past generations. Reading historical sources in order to unearth the embryonic origins of later ideas and notions is tantamount to looking for an understanding in the past which at the time was still in the future. This is a mistake often made in the study of historical jurisprudence and of dogmatic history. The works of past jurists and historical dogmas are studied for their impact on what was then the future, and not for what they meant in their own timeframe. For almost each important and well-studied great jurist from the past, the works on his impact on later times are far more numerous then those on his context and inspirations. These so-called historical studies focus on what the jurist could not yet know rather than on what he actually knew. A case in point is the vast literature, which is still being added to by international lawyers on the 'great fathers' of modern international law, chief among them the Dutch humanist Hugo Grotius (1583-1645). The number of books and articles written on his international thought is stunning, but the overwhelming majority of it is concerned with the impact of Grotius on later times or his actuality. Only in recent times, has the interest in the historical Grotius gained prominence. But particularly in the Anglo-American world, where the historical interest is of more recent date than in continental Europe, the a-historical approach proves very resilient.[33]

This brings us to the fourth guideline: *history is context*. Every study of a historical fact or phenomenon should be contextual. Understanding the intellectual, cultural, social, economic and political context of past law is the only way of

[33] E.g. Hersch Lauterpacht, 'The Grotian Tradition in International Law', *British Yearbook of International Law*, 23 (1946) 1-53, while being an intellectual masterpiece is a good example of an a-historical approach of Grotius focusing on his actuality. To this day, it remains very influential and is still referred to by international lawyers as an important 'historical' study on Grotius.

understanding the law as it functioned and was understood then. For the legal historian, the context of a legal phenomenon reaches far beyond the phenomenon itself. In trying to reconstruct the historical meaning of a rule or dogma, the scholar should not to understand it not only within the setting of the legal system it pertained to, but also within its broad societal setting. We cannot correctly interpret a rule or dogma without knowing who made it, with what agenda and how it was applied. Over the past decades, the 'Cambridge School of Political Thought' has made headway in the contextual study of historical political thought.[34] Authors are studied from the perspective of their own life, their time and their context rather than from their impact on the future. Contextual study is more concerned with which authors they read and what their political or personal agenda and not so much with which authors they would be read by or to what political ends their theories were used in later times. A similar approach should be made towards past law, and particularly historical jurisprudence and dogmatic history. It is only through the reconstruction of the historical context of the law that it can take on meaning outside the world of its own logic, or rather our present-day logic.

At the conference on 'Time, history and international law' I referred to in my introduction, I had the honour to present my paper first. As it was an early and cold September morning in London, I felt the audience could do with some kind of wake-up call and so I started off by saying that the connection between the three topics of the conference was that one needs a lot of time to do the history of international law. The same goes for legal history at large. In our world of 'publish or perish' this may scare away many scholars from a serious engagement with the past. Also, scholars might find that when they take too much time to historically research a topic they may be

[34] The seminal work is Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols., Cambridge 1978.

overtaken by other scholars or their findings may have become irrelevant to current debates by the time they publish. Fortunately, there is some consolation for the hapless lawyer-turned-historian in a fifth guideline: *The past does not change; if it does, it wasn't the past to begin with*.